REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 010146/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

14 October 2022
Date

Signature

In the matter between:

ITHALA SOC LIMITED **APPLICANT**

and

THE SOUTH AFRICAN RESERVE BANK

PRUDENTIAL AUTHORITY **FIRST ESPONDENT**

THE MINISTER OF FINANCE NO **SECOND RESPONDENT**

MEC FOR ECONOMIC DEVELOPMENT TOURISM

AND ENVIROMENTAL AFFAIRS, KWAZULU NATAL

PROVINCE **THIRD RESPONDENT**

Summary: Urgent interim interdict pending the outcome of a review application seeking to review portions of an exercise of statutory function. Although the Court is not satisfied that the application deserved to be heard as one of urgency, the Court entertained the application for the sake of finality. The applicant failed to meet the requirements of an interim interdict. Held: (1) Application is heard as one of urgency. Held: (2) The application is dismissed. Held: (3) The applicant to pay the costs of this application which costs include the costs of employment of two counsel.

JUDGMENT

MOSHOANA, J

INTRODUCTION

[1] This is an urgent application in terms of which the applicant Ithala SOC Ltd (Ithala) seeks an interdict *pendente lite*. The application is duly opposed by the South African Reserve Bank Prudential Authority (PA) and the Minister of Finance (Finance). The Member of Executive Council for Economic Development Tourism and Environmental Affairs, Kwazulu Natal Province (MEC) although not a co-applicant supports the relief sought by Ithala. In fact, the MEC has launched its own review application seeking to review and set aside the same decision that Ithala impugns. In this application, Ithala approached this Court in two parts. Part A seeks an interim interdict and Part B seeks a review. Before me is the Part A. Part B is still to be heard by the Court in due course. PA and Finance contend that this application is not urgent and ought to be struck off the roll for want of urgency. The pair symbiotically contend that the relief sought is incompetent and ought to be

dismissed with costs. On the contrary, Ithala supported by the MEC contends that the application ought to be heard as one of urgency and a relief of interim interdict is competent.

BACKGROUND FACTS

[2] For the purpose of this judgment, it is obsolete to punctiliously recite the facts of this application. To a greater degree the pertinent facts are common cause. Around 1978, the Kwazulu Finance and Investment Corporation Limited (KFICL) was established by a Proclamation[1]. In 1999, the KFICL was reincarnated and renamed as Ithala Development Finance Corporation Ltd (IDFCL). Instead of calling for the moribund of IDFCL, section 2 (1) of Kwazulu Natal Ithala Development Finance Corporation Act[2] (Ithala Act) breathed life into IDFCL. IDFCL continued to be a juristic person and provincial public entity. In terms of the Ithala Act, the IDFCL became the sole shareholder of Ithala. In terms of section 30 of the Ithala Act, Ithala was empowered to accept, hold and invest deposits offered by any person on such conditions as the Minister of Finance or the Registrar of Banks may determine in terms of the Banks Act.[3] I interpose to recognize that in terms of section 30 the power of Ithala to accept, hold and invest deposits is trammelled by such conditions determined by the Minister and the Registrar. In terms of section 31 of the same Act, for as long as Ithala accepts deposits from the public, it must comply with any requirement or condition imposed by the Minister or Registrar in terms of the Banks Act.

[3] It became common cause that for decades, Ithala conducted business as a deposit taking institution following exemptions issued by the PA with the approval of Finance. Pertinent to the present application on 12 July 2022, the Chief Executive Officer (CEO) of the PA designated with the approval of Finance that the business of Ithala shall not be deemed to constitute the business of a bank until 15 December 2023

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[1] Proclamation R.73 of 1978.

[2] Act 05 of 2013 as amended.

[3] Act 94 of 1990 as amended.

subject to certain conditions. It is not necessary for the purpose of this judgment to tabulate those conditions. It suffices to state that as far as Ithala as supported by the MEC is concerned, the conditions mimic the epic spaghetti Western film of "*the Good, the Bad and the Ugly*". Some conditions are good and acceptable whilst others are draconian to a point of being unlawful and or irrational.

[4] It is the *Bad and the Ugly* (so-called draconian and impossible to meet) that gave rise to the present application. The notice of motion presented by Ithala in respect of Part A impugns conditions 3.5, 4.3, 4.5, 4.8 and 4.9. For the sake of brevity, it is unnecessary to regurgitate the contents of those listed conditions. It suffices to refer to them collectively as the "*offending conditions*". Chagrined by the offending conditions, on 2 August 2022, Ithala launched the present application. On 16 August 2022, the present application emerged before Justice Van der Westhuizen. Owing to the fact that the matter required a special allocation, it was removed from the roll. The application gained a special allocation for the 11th October 2022. On this day, the matter was heard on a virtual platform albeit it was to be heard in a physical Court.

ARGUMENT

[5] Four counsel appeared before me. All counsel had provided this Court with helpful written submissions. In brief, Mr Dixon submitted that the present applicant commands space on the urgent roll. In addition, he submitted that Ithala has made out a case for the interim relief. He submitted that since the offending conditions are draconian and impossible to meet, this Court must exercise its discretionary remedy of interdict pending the review application. He further submitted that in due course, it shall be demonstrated that the decision to impose the offending condition is procedurally unfair because they were imposed contrary to the common law principle of *audi alteram partem*. He urged this Court to grant the relief sought together with an appropriate order as to costs. This Court debated at length with Mr Dixon on the applicable legal principles, but he remained steadfast that Ithala is entitled to the relief sought. Mr Dickson SC appeared for the MEC. In support of Ithala, he submitted that a case for the relief sought has been made. He submitted

that the offending conditions do not meet the legality principle because they were irrationally made. He submitted that this Court by issuing an injunction it would maintain the *status quo ante*. Upon realising that the exemption of 28 January 2022 had expired, he conceded that the only *status quo ante* to remain will be the July 2022 exemption with limited conditions if the Court excise the offending conditions. Of course this implied that this Court would usurp the statutory powers of the PA and the Finance by issuing as it were a differently conditioned exemption.

[6] Mr Maenetje SC appeared on behalf of PA. In short, he submitted that the application is not urgent and the relief sought is not competent. Relying on the binding authority of *National Treasury and others v OUTA and others (OUTA)*[4], he submitted correctly so that a Court may only interdict the performance of a statutory function in the most clearest of terms. He also correctly submitted that launching of a review application is not licence to an interim interdictory relief. Ms Abrahams appeared for Finance. She supported the submissions made by Mr Maenetje SC. Additionally, she submitted that the requirements of an interim interdict as extrapolated in *OUTA* has not been met. Both Maenetje SC and Abrahams submitted that the application must be dismissed with an appropriate order as to costs.

ANALYSIS

[7] Since urgency has been attacked, it behoves this Court to determine that issue first. A cardinal allegation to make in compliance with rule 6 (12) (a) of the Uniform Rules is whether an applicant shall be accorded substantial redress in due course or not. What is required is not only a redress but a substantial one. A substantial redress is one that is real and tangible rather than an imaginary one. This Court is satisfied that a review is a real and tangible relief available to Ithala in due course. Rule 6 (12) only advantages an applicant to be ahead of the queue, but does not entitle the applicant to a relief sought. Since hearing a matter as one of urgency, involves an exercise of judicious discretion, given the view I take at the end; I prefer to take a

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[4] 2012 (11) BCLR 1148 (CC))

pragmatic approach. If I were to take a robust approach, I would instantaneously strike this matter off the urgent roll. The approach I intend taking is that of disposing of the application instead of kicking the can further down the road and trouble another justice of this Court with a similar application some other day. For this reason alone, I shall entertain this application as one of urgency.

THE MERITS

[8] Since the decision of *Setlogelo v Setlogelo*[5], the discretionary remedy of interdict existed to prevent any continuation of unlawfulness.

[9] More recently, the Constitutional Court in *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*[6], felicitously stated the law as follows:

> "[47] An interdict is an order by a court prohibiting or compelling the doing of a particular act for the purposes of protecting legally enforceable right, which is threatened by continuing or anticipated harm…
>
> [48] In granting an interdict, the court must exercise its discretion judicially upon consideration of all the facts and circumstances. An interdict is "not a remedy for the past invasion of rights: it is concerned with the present and the future". The past invasion should be addressed by an action of damages. An interdict is appropriate only when future injury is feared."

The requisites of an interim interdict are well known. They are (a) *prima facie* right even if open to some doubt; (b) injury actually committed or reasonably apprehended; (c) the balance of convenience; and (d) absence of similar protection by any other remedy. In *OUTA*, the learned Moseneke DCJ said the following:

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[5] 1914 AD 221.

[6] An unreported judgment (CCT 39/21) [2022] ZACC 34 (22 September 2022)

"[50] Under the *Setlogelo* test, the *prima facie* right a claimant must establish is not merely the right to approach a court in order to review...it is a right to which if not protected by an interdict, irreparable harm will ensue.

[51] ... therefore, the harm that the applicants rely upon will not be caused by the past decisions they impugn in the review. There is a misalignment between the decisions they seek to review and the source of the harm they fear."

The Constitutional Court in *OUTA* cited with approval *Gool v Minister of Justice and another*[7] where the following was said:

"The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegations of *mala fides,* the Court does not readily grant such an interdict."

The law as codified in *City of Tshwane Metropolitan Municipality v Afriforum and another*[8] was aptly stated in the following terms:

"[55] Before an interim interdict may be granted, one of the most crucial requirements to meet is that the applicant must have a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted...

[56] Within the context of a restraining order, harm connotes a common-sensical, discernible or intelligible disadvantage or peril that is capable of legal protection... And that disadvantage is capable of being objectively and universally appreciated as a loss worthy of some legal protection...

[10] In the present instance, imposing conditions when an exemption is granted is an exercise of a statutory function. Section 30 (2) of the Ithala Act tasks the Minister or the Registrar with a function to determine conditions of accepting, holding and investing deposits. Section 31 of the Ithala Act makes it clear that Ithala is obliged to comply with any condition imposed in terms of the Banks Act. Therefore, when

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[7] 1955 (2) SA 682 (CPD).

[8] 2016 (9) BCLR 1148 (CC).

the PA imposed the offending conditions, it was exercising statutory powers. There is no collateral attack before this Court to suggest that the provisions of the Ithala Act and or the Banks Act allowing the exercise of the statutory function is in any manner or shape unconstitutional. Section 1 (1) (cc) of the Banks Act provides that any activity of a public sector, governmental or other institution, or of any person of category of persons designated by the Authority, with the approval of the Minister by notice in the Gazette may conduct the business of a bank, provided such activity is performed in accordance with such conditions as the Authority may with the approval of the Minister determine in the relevant notice. Mr Maenetje SC submitted that the word 'provided' means 'on condition'. I agree. As far back as 1866, the United States Court in *Stanley v Colt*[9], having placed reliance on *Hadley v Hadley*[10] and *Tattersall v Howell*[11], reached the following apt conclusion:

> "The usual and legal effect of this word 'provided' being therefore to create a conditional estate, subject to forfeiture by a breach of the condition, this court will give it such construction here."

[11] In *Hadley*, it was held that the words 'provided' and 'on condition' had the same effect in making a devise conditional. The conclusion this Court reaches is that as a matter of law, Ithala cannot perform the business of a bank activity without complying with the conditions. As correctly submitted by Maenetje SC, a business of a bank and conditions imposed are tight to the hip. This Court is not empowered to perform a surgical operation on a designation made by the PA. This apt legal position renders it unnecessary for this Court to consider whether the offending conditions are draconian or impossible to satisfy as contended for by Ithala. The only time a Court is permitted to declare a law to be unacceptable and by extension unconstitutional and unlawful is when the provision of section 172(1) (a) and (2) of the Constitution of the Republic of South Africa, 1996 (Constitution) are applicable. Absent an allegation that the provisions of the Ithala Act and the Banks Act are inconsistent

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[9] 72 US 119.

[10] 4 Gray 145.

[11] 2 Marivale 26

with the Constitution, a Court is not empowered to declare the provisions to be invalid. By submitting that the conditions as lawfully imposed are draconian and impossible to meet, in a circuitous manner, Ithala is suggesting that the law allowing the imposition of "draconian" conditions is invalid.

[12] The trite principle that in motion proceedings an applicant stands and falls by the allegations made in the founding affidavit is very much applicable in urgent motion proceedings. In its founding papers, Ithala contends that it bears a clear or *prima facie* right to review a decision and its rights to do so are established by the common and statutory law. It is long settled that a right of review does not gain an applicant a right to an interim relief. Otherwise, an interim interdict will be there for a taking by any applicant that apply for a review.

[13] This Court is in agreement with a submission that Ithala failed, I may add dismally so, to establish the requirements of an interim interdict. No right has been established, even one open to some doubt. Mr Dickson SC referred to the exemption as a wind down order. I disagree. Applying the unitary approach (text, context and purpose) as commanded[12], does not lead this Court to an interpretation that the exemption constitutes a wind down order. The winding down will happen should Ithala fail to meet its lawful exemption conditions. The winding down does not and shall not happen miraculously and descent like *manna* from heaven.

[14] It is perspicuous that Ithala has a similar protection in due course by way of a review application. Should a review be successful[13], Ithala will continue to enjoy the protection until its position is regularised to enable it to function lawfully as a bank or a mutual bank. On its own version, reaching such a lawful destination is not an impossibility or beyond reach. Therefore, at this stage, this Court is not faced with

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[12] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) and *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC).

[13] This Court has its own reservation about the prospects of success. Nevertheless, it is not the intention of this judgment to influence the Court to be seized with the review application in due course.

any irreparable harm deserving of legal protection by way of an interdict. Having reached the conclusion that Ithala has failed to meet the requirements of an interim interdict, it is unnecessary to render any decision in so far as the applicability of the provisions of the Intergovernmental Relations Framework Act (IRFA)[14].

[15] In conclusion, the relief sought in part A must be refused with an appropriate order as to costs. This Court is not satisfied that Ithala has a *prima facie* right that is threatened with irreparable harm. The balance of convenience does not favour the granting of an injunction. To the extent that Ithala alleges that the conditions are draconian and impossible to satisfy alternatively irrational, a review that is already launched shall in due course provide Ithala with a similar protection. In any event, clause 4.8.1 of the designation clearly provides that the wind down shall occur on written notice if Ithala fails to comply and fail to remedy; if the PA withdraws the designation or if Ithala fails to obtain authorisation to establish a bank or mutual bank by 30 June 2023.

[16] For all the above reasons, the following order is made:

ORDER

1. The Part A of the application is dismissed.
2. The applicant must pay the costs of this application, which costs includes the costs of employing two counsel.
3. The application is heard as one of urgency in accordance with the provisions of Rule 6 (12) and the requirements pertaining to forms and service are dispensed with.

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[14] Act 13 of 2005 as amended.

GN MOSHOANA
Judge of the High Court

APPEARANCES

Counsel for the Applicant:	Mr L Dixon
Instructed by:	Phosa Loots Inc, Attorneys, Pretoria
Counsel for the First Respondent:	Mr N Maenetje SC with him Mr M Majozi
Instructed by:	Werksmans Attorneys, Sandton.
Counsel for the Second Respondent:	Ms L C Abrahams
Instructed by:	State Attorney, Pretoria.
Counsel for the Third Respondent:	Mr A J Dickson SC, A Christison and T Palmer
Instructed by:	Matthew Francis Inc, Pietermaritzburg
Date of the hearing:	11 October 2022
Date of judgment:	14 October 2022